# Huzir bin Hassan v Ketua Polis Daerah, Johor Bahru

HIGH COURT (JOHOR BAHRU) — CRIMINAL APPLICATION NO 44–33–1989
HAIDAR J
28 FEBRUARY 1994

***Evidence*** *— Public document — Accused's uncautioned statement — Whether accused had right to inspect statement under s 76 of the Evidence Act 1950 — Whether relevant for defence — Evidence Act 1950 s 76*

***Criminal Procedure*** *— Disclosure of information — Accused's statement — Uncautioned statement recorded under s 4 of the Dangerous Drugs (Special Preventive Measures) Act 1985 — Whether statement necessary for defence — Dangerous Drugs (Special Preventive Measures) Act 1985 s 4 — Criminal Procedure Code (FMS Cap 6) s 51*

***Criminal Procedure*** *— Disclosure of information — Accused's statement — Uncautioned statement recorded under s 4 of the Dangerous Drugs (Special Preventive Measures) Act 1985 — Whether court could order production of statement under s 51 of the Criminal Procedure Code (FMS Cap 6) — Discretion of court — Criminal Procedure Code (FMS Cap 6) s 51*

***Criminal Procedure*** *— Disclosure of information — Accused's statement — Uncautioned statement recorded under s 4 of the Dangerous Drugs (Special Preventive Measures) Act 1985 — Whether statement against national interest under s 14 — Dangerous Drugs (Special Preventive Measures) Act 1985 ss 4 & 14*

The applicant was arrested and charged with trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952. During his detention under s 117 of the Criminal Procedure Code (FMS Cap 6) ('the CPC'), he made two statements, one cautioned and the other uncautioned. The cautioned statement was supplied to the applicant by the Ketua Polis Daerah, Johor Bahru ('the respondent'), but the uncautioned statement was refused. The applicant sought an order from the court that the respondent do furnish to the applicant or his solicitors the uncautioned statement which was recorded under s 4 of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act'). The applicant based his application on the grounds that he had a right to it as he had a tangible interest in it and that it was necessary for the purpose of his trial for drug trafficking, which was still pending before the Johor Bahru High Court. Counsel for the applicant submitted that so long as the applicant could prove that the statement was a public document under s 74 of the Evidence Act 1950 and that he has a right to it under s 76 of the Evidence Act 1950, he was entitled to it, irrespective of the law under which the statement was recorded. Counsel also relied on s 51 of the CPC which empowers the court to order production of any document necessary for the purposes of any proceeding under the CPC.

The respondent objected to the application on the basis that because the uncautioned statement was recorded under s 4 of the Act, by virtue of s 14 of the Act, it would be against national interest to produce the uncautioned statement.

**Held**, dismissing the application:

(1) Section 76 of the Evidence Act 1950 does not expressly confer the right to inspect a public document. Although the applicant may have an interest in the uncautioned statement, it is not admissible in evidence and, as such, cannot be relevant for the purpose of his defence in the pending drug trafficking charge.

(2) The relevant statement for the purpose of his defence, which is admissible, would be the cautioned statement of which a copy had been supplied to him. As the applicant cannot rely on the uncautioned statement as his defence or to support his defence in the pending drug trafficking charge, there is no necessity to furnish him with it for the protection of his interests.

(3) In exercising its discretion under s 51 of the CPC, the court has to consider the justice of the case. As long as the accused in a criminal trial has sufficient notice of what is alleged against him so as to enable him to prepare his defence, the law is satisfied. In the pending charge of drugs trafficking against the applicant, he had sufficient notice of the allegations against him and the cautioned statement was duly furnished to him. In fact, the applicant could rely on his cautioned statement as a defence. In the circumstances, the justice of the case would have been met and the requirement of the law was satisfied.

(4) The uncautioned statement of the applicant was recorded under the Act, which a special law relating to preventive detention, and not under the CPC for purposes of trials in courts. National interest is the primary consideration as to whether the uncautioned statement should be furnished to the applicant. What is 'national interest' is a matter for the executive and not the court to decide and s 14 of the Act clearly protects any public servant from producing documents which he considers to be against national interest to do so. Therefore, the recording of the uncautioned statement under the Act appears to render it inadmissible as once s 14 of the Act is invoked by the respondent, the applicant is not entitled to be furnished with the uncautioned statement.

**[Bahasa Malaysia summary**

Pemohon telah ditangkap dan dituduh kerana mengedar dadah berbahaya di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952. Semasa tahanannya di bawah s 117 Kanun Acara Jenayah (FMS Bab 6) ('Kanun itu'), beliau membuat dua pernyataan, satu beramaran dan satu lagi tanpa beramaran. Pernyataan beramaran itu telah dibekalkan kepada pemohon oleh Ketua Polis Daerah, Johor Bahru ('responden'), tetapi pernyataan tanpa beramaran itu enggan dibekalkan. Pemohon

telah memohon suatu perintah daripada mahkamah supaya responden mengemukakan kepada pemohon atau peguamcaranya pernyataan tanpa beramaran itu yang telah direkodkan di bawah s 4 Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 ('Akta itu'). Pemohon berdasarkan permohonannya atas alasan bahawa beliau mempunyai hak mendapat pernyataan itu kerana beliau mempunyai suatu kepentingan ketara di dalamnya dan ianya perlu untuk tujuan perbicaraannya kerana mengedar dadah berbahaya yang masih menunggu penyelesaian di Mahkamah Tinggi Johor Bahru. Peguambela bagi pihak pemohon menghujahkan bahawa asalkan pemohon dapat membuktikan bahawa pernyataan itu merupakan suatu dokumen awam di bawah s 74 Akta Keterangan 1950 dan bahawa beliau mempunyai hak untuk mendapatkannya di bawah s 76 Akta Keterangan 1950, beliau berhak menerimanya, tidak kira di bawah undang-undang mana pernyataan itu telah direkodkan. Peguambelanya juga bergantung kepada s 51 Kanun itu yang memberikan mahkamah kuasa untuk memerintahkan pengemukaan sebarang dokumen yang perlu bagi tujuan sebarang prosiding di bawah Kanun itu.

Responden telah menentang permohonan itu atas alasan bahawa oleh kerana pernyataan tanpa beramaran itu telah direkodkan di bawah s 14 Akta itu, adalah bertentangan dengan kepentingan negara untuk mengemukakan pernyataan tanpa beramaran itu.

**Diputuskan,** menolak permohonan itu:

(1) Seksyen 76 Akta Keterangan 1950 tidak secara nyata memberikan hak untuk memeriksa suatu dokumen awam. Walaupun pemohon mungkin mempunyai suatu kepentingan di dalam pernyataan tanpa beramaran itu, ianya tidak boleh diterima sebagai keterangan dan, dengan itu, tidak mungkin relevan bagi tujuan pembelaannya di dalam tuduhan mengedar dadah yang masih belum selesai itu.

(2) Pernyataan yang releven untuk tujuan pembelaannya, yang boleh terima, adalah pernyataan beramaran itu, dan sesalinannya telahpun dibekalkan kepadanya. Oleh kerana pemohon tidak boleh bergantung kepada pernyataan tanpa beramaran itu sebagai pembelaannya atau untuk menyokong pembelaannya terhadap tuduhan mengedar dadah yang masih belum selesai itu, tidaklah perlu untuk memberikan beliau sesalinan pernyataan itu untuk perlindungan kepentingannya.

(3) Apabila menggunakan budi bicaranya di bawah s 51 Kanun itu, mahkamah mesti mempertimbangkan keadilan kes itu. Asalkan tertuduh di dalam suatu perbicaraan jenayah mempunyai notis yang mencukupi mengenai apa yang dikatakan terhadapnya untuk membolehkan beliau menyediakan pembelaannya, keperluan undang-undang dipenuhikan. Di dalam tuduhan mengedar dadah yang masih belum selesai terhadap pemohon, beliau mempunyai notis yang mencukupi tentang pengataan terhadapnya dan pernyataan beramaran itu telahpun diberikan kepadanya. Pada

hakikatnya, pemohon boleh bergantung kepada pernyataan beramarannya sebagai suatu pembelaan. Di dalam keadaan ini, keadilan kes ini telah dipenuhi dan keperluan undang-undang dipuaskan.

(4) Pernyataan tanpa beramaran pemohon telah direkodkan di bawah Akta itu, yang merupakan suatu undang-undang khas berkenaan dengan tahanan pencegahan, dan bukannya di bawah Kanun itu bagi tujuan perbicaraan di mahkamah. Kepentingan negara merupakan pertimbangan utama mengenai sama ada pernyataan tanpa beramaran itu seharusnya diberikan kepada pemohon. Apa yang merupakan 'kepentingan negara' adalah suatu perkara yang diputuskan oleh pihak eksekutif dan bukan mahkamah dan s 14 Akta itu jelas melindungi sebarang pegawai kerajaan daripada mengemukakan dokumen yang beliau berpendapat akan bertentangan dengan kepentingan negara jika dikemukakan. Oleh itu, tindakan merekodkan pernyataan tanpa beramaran itu di bawah Akta itu kelihatan menjadikannya tidak boleh diterima kerana sebaik sahaja s 14 digunakan oleh responden, pemohon tidak berhak diberikan pernyataan tanpa beramaran itu.]

[*Editorial Note*: The applicant's previous application on similar grounds to the High Court was dismissed but his appeal to the Supreme Court was allowed. See [1991] 1 MLJ 445.]

**Notes**

For cases on disclosure of an accused's statement, see 5 *Mallal's Digest* (4th Ed) paras 1081–1084.

**Cases referred to**

1 *Husdi v PP* [1979] 2 MLJ 304 (folld)
2 *Anthony Gomez v Ketua Polis Daerah Kuantan* [1977] 2 MLJ 24 (refd)
3 *Mutter v Eastern and Midlands Railway Co* LR 38 Ch D 92 (refd)
4 *Haji Abdul Ghani bin Ishak v PP* [1980] 2 MLJ 196 (distd)
5 *PP v Raymond Chia Kim Chwee & Anor; Zainal bin Hj Ali v PP* [1985] 2 MLJ 436 (folld)
6 *Re Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ 182 (folld)
7 *BA Rao & Ors v Sapuran Kaur & Anor* [1978] 2 MLJ 146 (distd)
8 *Re Neo Guan Chye, decd* [1935] MLJ (folld)

**Legislation referred to**

Criminal Procedure Code (FMS Cap 6) s 51
Dangerous Drugs (Special Preventive Measures) Act 1985 s 14

*Teh Poh Teik* (*Teh Poh Teik & Co*) for the applicant.
*A Rashid bin Daud* (Deputy Public Prosecutor) for the respondent.

*Cur Adv Vult*

**Haidar J**: In this criminal application, by way of notice of motion, Huzir bin Hassan ('the applicant') sought an order from the court that Ketua Polis Daerah, Polis Di Raja Malaysia, Johor Bahru ('the respondent') do furnish to the applicant or his solicitors the uncautioned statement(s) made by the applicant to the police during the detention under s 117 of the Criminal Procedure Code (FMS Cap 6) ('the CPC'). The applicant filed an affidavit in support thereof.

The respondent objected to the application by way of the affidavit of Insp Jaafar bin Mohd Aris of Cawangan Anti-Dadah, Ibu Pejabat Polis Kontingen, Johor (encl 9).

It is not disputed that the applicant made two statements, one of which was cautioned and the other uncautioned (see para 2 of his affidavit at encl 2). The cautioned statement was supplied to the applicant by the respondent but the uncautioned statement was refused. The refusal, according to the affidavit of Insp Jaafar, was because the uncautioned statement was recorded under s 4 of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act') and by virtue of s 14 of the Act it would be against national interest to produce the uncautioned statement.

The applicant in this criminal application wanted the uncautioned statement on the basis that he has a right to it as he has a tangible interest in it and for the purpose of his trial for dangerous drugs trafficking, which is still pending before the High Court here. Mr Teh Poh Teik, counsel for the applicant, went on further to submit that irrespective of whatever laws the statement was recorded under, so long as the applicant could prove that the statement is a public document under s 74 of the Evidence Act 1950 and that he has a right to that document under s 76 of the Evidence Act 1950, he is entitled to it. Sections 74 and 76 of the Evidence Act 1950 were considered by Syed Othman FJ in *Husdi v PP*,[1] where at p 306 his Lordship said:

> On the face of it, a police statement falls under s 74 of the Evidence Act, as it is a document forming the act of a public officer. Simply because a document is the act of a public officer does not give a person, interested or otherwise, a right to inspect. Section 76 of the Evidence Act merely relates to the manner of certification. *It is not an enactment which confers any right.* It presupposes the existence of the right to inspect. (Emphasis added.)

However, in *Anthony Gomez v Ketua Polis Daerah Kuantan*,[2] the Federal Court in dealing with the first information report, held:

> ... although s 76 of the Evidence Act is silent as to the right of a person to inspect a first information report, it is clear that *under the common law* the appellant has that right as he is a person interested in it and inspection is necessary for the protection of his interest. The first information report is admissible in evidence in the criminal trial under s 157 of the Evidence Act and therefore the appellant or his counsel should be supplied with a copy. (Emphasis added.)

The Federal Court in construing such a right as a common law right quoted the judgment of Lindley LJ at p 106 in *Mutter v Eastern and Midlands Railway Co*:[3]

> Where the right to inspect and take a copy is not expressly conferred, the extent of such right depends on the interest which the applicant has in what he wants to copy and on what is reasonably necessary for the protection of such interest. The common law right to inspect and take copies of public documents is limited by this principle ...

The purpose of the uncautioned statement, according to the applicant, is for his defence in a pending dangerous drugs trafficking charge and therefore it was contended that the uncautioned statement is relevant and the applicant has an interest in it and hence the right to it. With respect, I am of the view that an uncautioned statement does not appear to be admissible (see *Husdi v PP*[1] at p 306). In the circumstances, I do not see how the uncautioned statement, though he may have interest in it, is relevant for the purpose of his defence in the pending dangerous drugs trafficking charge. The relevant statement for the purpose of his defence (and which is admissible) would be the cautioned statement of which a copy has been supplied to him. The learned counsel for the applicant relied on the case of *Haji Abdul Ghani bin Ishak v PP*[4] to support his contention that the applicant is entitled to the uncautioned statement. With respect, the decision on this aspect is only obiter dicta and in any event it is distinguishable in that the uncautioned statement of the applicant was recorded under a special law relating to preventive detention and not recorded under the CPC as in *Haji Abdul Ghani*'s case[4] for purposes of trials in courts. The recording of the uncautioned statement under the Act, as I said earlier, does appear to be inadmissible and the applicant cannot rely on it as his defence or to support his defence in the pending dangerous drugs trafficking charge, and where then is the necessity of furnishing him with the uncautioned statement for the protection of his interest?

Besides relying on the relevant provisions of the Evidence Act 1950, the application as the heading denotes, is made under s 51 of the CPC. Section 51 of the CPC was considered by the Federal Court in *PP v Raymond Chia Kim Chwee & Anor; Zainal bin Hj Ali v PP*[5] by way of criminal reference.

Section 51 of the CPC, in so far as it is relevant, reads:

> (i) Whenever any Court or police officer making a police investigation considers that the production of any property or document is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer such Court may issue a summons or such officer a written order to the person in whose possession or power such property or document is believed to be requiring him to attend and produce it or to produce it at the time and place stated in the summons or order.

This is what the Federal Court said [in *PP v Raymond Chia*[5]] at p 439 thereof:

> From the language of the section ('necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding') it is quite plain that an application under that section may be made before the commencement of a trial or in the course of a trial. In exercising its discretion under s 51(i) of the Criminal Procedure Code the court has to consider the justice of the case and at what stage of the proceeding the application is made.

Further, on the same page, the Federal Court said:

> The entitlement of the accused under s 51 of the Criminal Procedure Code to any document or copies of document or other material in the possession of the prosecution is entirely at the discretion of the court having regard to the justice of the case. The discretion should not however be exercised so as to enable the accused to gain access to materials before the trial as in the case of pre-trial discovery and inspection of documents in a civil proceeding. *The accused in a criminal trial should have sufficient notice of what is alleged against him so as to enable him to prepare his defence. So long as that requirement is satisfied the law is satisfied.* (Emphasis added.)

It would seem clear in the pending charge of dangerous drugs trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952 against the applicant that he had sufficient notice of what is alleged against him in which the cautioned statement was duly furnished to him. In fact, the applicant may rely on his cautioned statement as a defence. In the circumstances, the justice of the case would have been met and the requirement of the law was satisfied.

The object and purpose of the Act is to provide for the preventive detention of persons associated with any activity relating to or involving the trafficking in dangerous drugs which empowers the Minister, inter alia, if satisfied that such person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs and that it is in the public interest to order that such person be detained, by order, direct that such person be detained for a period not exceeding two years. The Minister may, instead of directing the person be detained, make an order imposing restrictions and conditions in respect of his activities, freedom of movement or places of residence or employment (see sub-ss (1) and (3) of s 6 of the Act). It would seem clear that the uncautioned statement recorded under the Act is for a different object and purpose. As an uncautioned statement is inadmissible in evidence compared to the cautioned statement recorded under the Dangerous Drugs Act 1952 or the CPC, the information recorded under the Act would, in my view, be radically different. The recording of the uncautioned statement would be more from the angle of prejudice to public order and to prevent the threat of a substantial body of persons in that respect from inside and outside Malaysia as the preamble to the Act seems to indicate. I am of the opinion that it was for this purpose that the legislature thought it fit to enact s 14 in the Act in respect of non-disclosure of information recorded under the Act. Section 14 reads:

> Nothing in this Part or in any rules or regulations made thereunder shall require the Minister or any member of an Advisory Board or any Inquiry Officer or *any public servant* to disclose facts or to produce documents which he considers to be against the national interest to disclose or produce. (Emphasis added.)

To my mind, what is 'national interest' is a matter for the executive to decide and not for the court and s 14 of the Act clearly protects 'any public servant' from producing documents which he considers to be against 'national interest' to do so. In this respect, the Supreme Court in *Re Tan Sri Raja Khalid bin Raja Harun*[6] at p 188, said:

> In such case, whilst the authority was required to hear representation from the aggrieved person, in no sense would it be bound to disclose any grounds or information which in its opinion would constitute security. This is entirely a matter for the authority concerned.

Further, on the same page, the Supreme Court stated:

> The learned judge was also in error to ignore the express provision of cl (3) of art 151 of the Constitution for by that clause the authority cannot be required to furnish facts whose disclosure would in its opinion be against national interest.

Similarly here, I would be in error to ignore the express provision of s 14 of the Act if I were to order that the applicant be furnished with the uncautioned statement. In other words 'national interest' is the primary consideration as to whether the uncautioned statement should be furnished or not to the applicant. There has been no affidavit-in-reply by the applicant to the affidavit of Insp Jaafar that the uncautioned statement was not recorded under the Act.

The case of *BA Rao & Ors v Sapuran Kaur & Anor*[7] relied on by the applicant is not applicable as the Federal Court was dealing with ss 123 and 162 of the Evidence Act 1950. I would even go one step further to say that the uncautioned statement is not a document made in 'official confidence' within the meaning of s 124 of the Evidence Act 1950 (see *Re Neo Guan Chye, decd*[8] at p 272). There was therefore no necessity for the respondent to issue a certificate under s 124 of the Evidence Act 1950.

In a nutshell, once s 14 of the Act is invoked by the respondent, the applicant is not entitled to be furnished with the uncautioned statement.

In the circumstances, I am of the opinion that the uncautioned statement is not only irrelevant for the purposes as indicated by the applicant, he is not entitled to it by virtue of s 14 of the Act. This is a proper case where the court should decline to exercise its discretion (even if it has) having regard to the justice of the case and as stated by the Federal Court in *PP v Raymond Chia Kim Chwee & Anor*[5] at p 439:

> If the discretion is to be exercised before the commencement of trial the court cannot anticipate how the prosecution will proceed. In other words the court would not be justified to direct the prosecution to deliver to the accused all documents taken from him for that will not be a correct exercise of the discretion under s 51 of the Criminal Procedure Code.

The application is accordingly dismissed.

*Application dismissed.*

Reported by Anne Khoo